



WILDERNESS WATCH

Keeping Wilderness Wild

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Russell Hanson
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390 North 100 East
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September 13, 2024

Sent via the internet portal at <https://www.fs.usda.gov/project/?project=66370>
and copies via email to comments-intermtn-uinta-pleasantgrove@usda.gov and
russell.hansonjr@usda.gov

Dear Ranger Hanson:

These are comments from Wilderness Watch on the scoping letter for the Emerald Lake shelter project. Wilderness Watch is a national wilderness advocacy organization, headquartered in Missoula, Montana, dedicated to the protection and proper administration of the National Wilderness Preservation System. Wilderness Watch members use and will continue to use the Mount Timpanogos Wilderness for wilderness-compatible pursuits. We are strongly opposed to the proposed action as it is incompatible with Wilderness. The proposed action would adversely affect Wilderness Watch's organizational interests, as well as its members' use and enjoyment of this area.

BACKGROUND AND INTRODUCTION

The construction of a nonessential structure in Wilderness violates the Act and the very concept of Wilderness. Make no mistake, this would be a new structure to replace one largely destroyed by natural processes. Nothing in the online scoping materials suggests this proposed new structure (or the old one) would serve the singular legal wilderness purpose, which is preservation of the area as Wilderness. Indeed, structures are generally prohibited in Wilderness, under Section 4(c) of the Wilderness Act.

The use of motorized equipment in Wilderness, including a helicopter, also violates section 4(c) of the Wilderness Act. The Forest Service should heed the words of Idaho Federal District Judge Winmill, "Helicopters carry 'man and his works' and so are antithetical to a wilderness experience. It would be a rare case where machinery as intrusive as a helicopter could pass the test of being 'necessary to meet minimum requirements for the administration of the area.'" In fact, the additional information on the project website online suggests the structure, built before designation, was constructed without motorized equipment such as a helicopter.

The agency has to demonstrate two things. The Forest Service must show that construction of every aspect of a new structure is the minimum necessary for preservation of the area as

Wilderness. Then, the Forest Service has to show that the use of every piece of motorized equipment and every use of motorized and/or mechanized transport is the minimum necessary for the protection of the area as Wilderness. This is a high bar and we don't see any way for the agency to demonstrate either in this case.

Further, the additional information folder and the scoping letter do not go into specific detail¹ about why the agency believes it can violate the Mount Timpanogos Wilderness in this way. What is evident is that the agency believes, contrary to the canons of statutory construction, that the Wilderness Act is internally inconsistent and that it can pick and choose what attributes it wishes to elevate even if it involves actions that are antithetical to Wilderness. This approach, in effect, amounts to an administrative repeal of the Wilderness Act. It turns the Wilderness Act on its head.

Had a minimum requirements analysis framework (MRAF, formerly the MRDG) been included and available to the public, it may have given more specificity on why the Forest Service believes it needs to construct a new structure with motorized equipment. There is a passing reference to a 2023 MRDG in the paper by the Forest's Heritage Program Archaeologist, but if such a document exists, it was erroneously omitted. Thus, we don't know if that MRDG is current or if a new one will be prepared.

The absence of the putative 2023 MRDG document or a newer MRAF document leaves out crucial information that should be available what is likely the only opportunity the public will have to comment on the project. We urge the Forest Service to make available the applicable MRDG or MRAF and extend the public comment period for 30 days thereafter.

The scoping letter on mentions the proposed action alternative. The EA needs to consider other options including removing some or all of the debris in a wilderness-compatible fashion.

Wilderness is defined in the Wilderness Act as being "in contrast with those areas" where humans and their works are dominant. Elevating a single largely demolished structure above the Wilderness itself amounts to administrative declassification of the Mount Timpanogos as Wilderness.

I was raised at the foot of Timp, was deeply involved in the passage of the Utah Wilderness Act of 1984, talked with the agency about "management" of the area not long after passage, and have hiked to the top of Timp many times. The shelter is younger than I am, so I certainly don't consider it historic. In more recent years I have been concerned the agency would try to maintain this unnecessary structure (and the "Glass House," too²), but I never imagined the agency would try to do so in such a cavalier way, using helicopters and other motorized equipment.

WILDERNESS REQUIREMENTS

The Wilderness Act establishes a National Wilderness Preservation System to safeguard our wildest landscapes in their "natural," "untrammeled" condition. 16 U.S.C. § 1131(a). "A

¹ There is reference to a minimum requirements decision guide (MRDG, now called the minimum requirements analysis framework or MRAF) supposedly completed in 2023, but it is not included in the materials. We discuss the MRAF process and its absence in this comment.

² If there have been other proposals to maintain these structures, especially with prohibited means, Wilderness Watch has no record of having received any notification to comment from the agency.

wilderness, in contrast with those areas where man and his own works dominate the landscape,” is statutorily defined as “an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain” and an area “retaining its primeval character and influence... which is protected and managed so as to preserve its natural conditions....” *Id.* § 1131(c). Thus, wilderness “shall be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment *as wilderness*, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment *as wilderness*....” *Id.* § 1131(a) (emphasis added). The Act’s opening section “sets forth the Act’s broad mandate to protect the forests, waters, and creatures of the wilderness in their natural, untrammelled state” and “show[s] a mandate of preservation for wilderness and the essential need to keep [nonconforming uses] out of it.” *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1061-62 (9th Cir. 2003) (en banc). At odds with this mandate, the proposed action would approve replacement of a structure destroyed by natural processes via the use of helicopters and other motorized equipment.

Conflating a structure, now deemed historic but wasn’t at the time of wilderness designation, with preservation of wilderness character is precisely the opposite of what the Act clearly intends. As the 11th Circuit Court of Appeals stated, “As an initial matter, we cannot agree with the Park Service that the preservation of historical structures furthers the goals of the Wilderness Act... the need to preserve historical structures may not be inferred from the Wilderness Act nor grafted onto its general purpose.” (see *Wilderness Watch v. Mainella*). The dissection of *wilderness character* into numerous qualities or attributes detracts from the **singular** purpose of wilderness in section 2(a) and referred to again in section 4(c) of the Act. This has its origins in the wilderness character monitoring protocol from Landres et al.³ Landres’ *Keeping it Wild* protocols are internal agency guidance documents that have not gone through formal notice and comment rulemaking. These documents are the subject of much disagreement and controversy, largely because they promote—intentionally or not—an interpretation of the Wilderness Act that is internally inconsistent and result in management actions that are antithetical to Wilderness preservation. See, e.g. Cole, et. al. 2015. While initially envisioned as a tool to help agencies measure wilderness character, on the ground it has had the unintended consequence of agencies (including the Forest Service here) to creep back into management paradigms that are predominant outside of Wilderness.⁴ A prime example of a rapidly growing consequence from *Keeping it Wild* is the erroneous idea that managers can weigh various components of wilderness character against each other, thereby reducing the Wilderness Act to a point-tallying system rather than a substantive law with cohesive goals and stringent prohibitions. This management mindset effectively and unlawfully repeals and rewrites the Wilderness Act.

Restraint and humility are important values underpinning the Wilderness Act, and “[l]and managers should exercise this same humility in dealing with wilderness areas, lest they lead us down a path to where there are no longer any places that are truly ‘wild,’ no places beyond the control of human institutions and cultural imperatives.” Sean Kammer, *Coming to Terms with Wilderness: The Wilderness Act and the Problem of Wildlife Restoration*, 43 ENVTL. L. 86

3 This inappropriate dissection is also used in the MRAE process. Since there is no publicly available MRDG or MRAE to evaluate, we can’t speculate as to what it might say.

4 Even Landres, in personal conversation, has expressed concern about the misuse of the wilderness qualities or attributes identified in the monitoring protocol as a way to make decisions in Wilderness for the use of 4(c) prohibitions. See also footnote 3.

(2013). Replacing a structure in Wilderness using helicopters and other motorized equipment is precisely the kind of action that the Act forbids.

Further, 36 CFR 293.6 clearly notes:

[t]here shall be in National Forest Wilderness no commercial enterprises; no temporary or permanent roads; no aircraft landing strips; no heliports or helispots, no use of motor vehicles, motorized equipment, motorboats, or other forms of mechanical transport; no landing of aircraft; no dropping of materials, supplies, or persons from aircraft; no structures or installations; and no cutting of trees for nonwilderness purposes.

The Scenic Area administrative designation and previous administrative policies ended when the Wilderness was designated. For whatever reasons—be they the loss of institutional knowledge in the Forest Service, the agency bias against Wilderness and for so-called historic structures, or something else—this proposal is not consistent with the mandates of the Wilderness Act. Even the Forest Service information about this project tacitly admits it is doubtful this project can go forth in the paper by the Forest Archaeologist, “Once the Mount Timpanogos Wilderness was established in 1984 this continued the effort to preserve environmental quality, however inadvertently it made maintenance and preservation of the two historic structures in the wilderness a dubious topic.”

Perhaps the best illustration of the agency's wilderness mandate is the description and graph of the agency's Wilderness Management Model (see also FSM 2320.6, Exhibit01). “The goal of wilderness management is to identify these influences, define their causes, remedy them, and close the gap (“A”) between the attainable level of purity and the level that exists on each wilderness (“X”).” FSM 2320.6. This proposal would push the Mount Timpanogos Wilderness in the wrong direction.

In sum, the Ninth Circuit Court of Appeals decision in *High Sierra Hikers v. Blackwell* made clear that preservation of wilderness character is paramount, “Although the Act stresses the importance of wilderness areas as places for the public to enjoy, it simultaneously restricts their use in any way that would impair their future use as wilderness. This responsibility is reiterated in Section 1133(b), in which the administering agency is charged with preserving the wilderness character of the wilderness area.” In other words, protection of the Wilderness comes before recreation or other perceived values of Wilderness. By definition, Wilderness excludes structures and motorized equipment as Section 4(c) of the Wilderness Act prohibits certain actions in Wilderness unless they are the minimum necessary for preservation of the areas as Wilderness. This is a high bar.

BUILDING A NEW STRUCTURE IS THE NOT THE MINIMUM NECESSARY

Nothing in the scoping letter or other information on the website demonstrates this is necessary for preservation of the area as Wilderness. Rather, the agency engages in extreme shoehorning to try and show that, contrary to the clear definition of Wilderness and prohibitions in the Act, the structure is necessary to preserve wilderness character. This conflation of the structure with the Wilderness itself has no support in law. Neither does the attempt to suggest that the structure fulfills wilderness purposes. Indeed, the singular use of “purpose” in Section 4(c) and in Section 2(a) is contrary to the shoehorning attempted by the Forest Service. It should also be recognized that there is no special language in the 1984 Wilderness Act pertinent to the Emerald Lake

Shelter (or the Glass House), although there are exceptions in that legislation for other uses and installations. When Congress wanted to make an exception for individual structures like the Emerald Lake Shelter, it has done so in legislation.

The Forest Service Manual 2323.13b states, "Except for Alaska, provide no new shelters. Shelters that existed at the time of wilderness designation may be maintained **if allowed by specific legislation, or until they require extensive maintenance.** Remove them at this time. For administrative facilities see FSM 2324.33." Emphasis added. As noted above, this is not mentioned in the legislation. It requires much more than extensive maintenance. This is not an administrative facility. The size of the Wilderness is so small as to obviate any perceived need for an administrative structure.

While the scoping letter has a paucity of information, we can infer the following from the letter itself and the additional information as to what the Forest Service may be suggesting. For example:

- The agency points out the shelter was built for the Timp hike. That hike was ended by the Forest Service because of the damage it caused to the then Scenic Area in 1969. Thus, the reason for the shelter no longer exists.
- The agency points out the shelter is a historic site. The National Historic Preservation Act (NHPA) does not trump the Wilderness Act. The NHPA only requires documentation of structures, not reconstruction. Further, the shelter was not eligible for the National Register at the time of designation and, to our knowledge, it has been nominated but not yet formally listed on the Register.
- The agency suggests the shelter is needed for safety. This shelter is not needed for safety. The Forest Service Manual (2320.3, item 10) clearly states, "Inform wilderness visitors that they face inherent risks of adverse weather conditions, isolation, physical hazards, and lack of rapid communications, and that search and rescue may not be as rapid as expected in an urban setting in all publications and personal contacts." In other words, visitors must understand that shelters are not to be found in Wilderness. Further, the TERT can operate without a permanent shelter just as wilderness rangers do in small Wildernesses. Timpanogos is neither a remote nor large Wilderness.⁵ Moreover, as the court found in rejecting the National Park Service's argument that similar shelters in the Olympic Wilderness could provide shelter in times of emergency, "The emergency exception of Section 16 U.S.C. § 1133(c) of the Wilderness Act...most logically refers to matters of urgent necessity rather than to conveniences for use in an emergency." (Olympic Park Associates v. Mainella). Were it any other way, the Forest Service could build shelters in every Wilderness so that visitors could get in from out of the rain, avoid lightning, warm up from the cold, or otherwise avoid experiencing the very Wilderness they set out to enjoy. This is clearly not what the Wilderness Act intended.

The additional materials also provide evidence that this structure is not a priority for the Forest Service. Continued deterioration, due in part to vandalism, and the dilapidated condition of the hut before the avalanche demonstrate the agency did not place a priority on maintaining this

⁵ If a safety issue does exist, the minimum necessary is not a shelter. Rather, it's educating visitors and controlling visitor use that creates the perceived safety concern. The fact that an on-site, non-Forest Service entity like TERT exists at all is a further indictment of the agency's wilderness administration.

structure or taking measures to prevent vandalism. To now claim that it must be built again (and using extensive motorized means) isn't supported by the record or consistent with past management practices or decisions.

It is also doubtful whether any new hut would better survive, especially in an era of global warming. Increased temperature fluctuations, storm events, and erratic changes in snowfall will likely increase the opportunity for avalanches and heavy snowfall in the area around Emerald Lake.

USING HELICOPTERS AND OTHER MOTORIZED EQUIPMENT IS THE NOT THE MINIMUM NECESSARY

"The agency charged with administering a designated wilderness area is responsible for preserving its wilderness character." *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 646 (9th Cir. 2004) (citing 16 U.S.C. §1133(b)). Congress made the mandate to protect wilderness character paramount over other land-management considerations, *see* 16 U.S.C. §1133(b), and expressly prohibited certain activities that it determined to be antithetical to wilderness preservation, including "landing of aircraft" and "use of motor vehicles [or] motorized." *Id.* §1133(c); *see also* 36 C.F.R. § 261.18(c) (Forest Service regulations prohibiting "[l]anding of aircraft, or dropping or picking up of any material, supplies, or person by means of aircraft, including a helicopter" in National Forest Wilderness); 36 C.F.R. § 293.6 (prohibiting "mechanical transport," "landing of aircraft," and "dropping of materials, supplies, or persons from aircraft" in wilderness except as provided by Wilderness Act). This is one of the strictest prohibitions in the Act. *See Wilderness Watch v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1040 (9th Cir. 2010). These uses and activities may be authorized by the Forest Service only where "necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act]." 16 U.S.C. § 1133(c).

"Helicopters carry 'man and his works' and so are antithetical to a wilderness experience. It would be a rare case where machinery as intrusive as a helicopter could pass the test of being 'necessary to meet minimum requirements for the administration of the area.'" *Wolf Recovery Found. v. U.S. Forest Serv.*, 692 F. Supp. 2d 1264, 1267-68 (D. Id. 2010); *see also Mont. Wilderness Ass'n v. McAllister*, 666 F.3d 549, 556 (9th Cir. 2011) (stating that, "from a common-sense perspective," helicopter presence "would plainly degrade ... wilderness character"). Accordingly, under the Wilderness Act, the Forest Service may only approve helicopter activities in the Wilderness if the Forest Service rationally demonstrates that building the largely demolished structure is necessary to meet minimum requirements for administration of the area for the purpose of the Wilderness Act, and there is no alternative to otherwise-prohibited uses that would achieve that purpose. *See* 16 U.S.C. § 1133(c).

The Forest Service's authorization violates the Wilderness Act because, as discussed above, the project is not necessary for administering the Mount Timpanogos Wilderness pursuant to the Wilderness Act. 16 U.S.C. §1133(c). Instead, the project goals and methods are fundamentally at odds with the Wilderness Act's mandate to preserve "untrammeled" character and "natural conditions." *Id.* §1131(c).

Even if we were to agree that the structure should be maintained, which we don't, the extensive use of motorized equipment, including helicopters, is not necessary. The materials on the Forest

Service website support this. According to the paper by Forest's Heritage Program Archaeologist, quoting from the September 1, 1959 Daily Herald, "material, including sand, rock and cement [were] hauled up by packhorse train" and "massive steel structures were toted" to the site on what seemingly was some kind of non-motorized but wheeled (mechanized) contraption.

This was before wilderness designation and just prior to the administrative scenic area designation. As such, there were not protections in place like those of Wilderness. Even then, the structure was built largely with wilderness-compatible means. This fact alone should prohibit the use of helicopters and other motorized equipment.

NEPA

Alternatives need to be considered including one that removes as much of the remnants as possible of the structure by wilderness-compatible means. It was largely constructed by those means even though the area was not designated as Wilderness at the time.

The scope of this project requires a full EIS under the National Environmental Policy Act given the significant impact to Wilderness. Using prohibited means in the Wilderness is a significant federal action.

If the Forest Service refuses to do an EIS, it should, at the very least, provide the public with the MRAF and reopen the public comment period for 30 days. The current scoping package gives little detail on the agency's rationale for this proposal. The public, the owners of the national forest system, are owed a better explanation as to why the agency wants to undertake such an activity that is antithetical to Wilderness here.

CONCLUSION

The natural deterioration of structures is part of Wilderness; it is evidence of untrammelled and timeless natural processes reclaiming the Wilderness from temporary human occupation. Insignificant historic structures or those causing resource damage should be removed if their removal can be done in a manner consistent with wilderness principles.

The Wilderness Act prohibits structures unless they are essential to protecting the Wilderness, which this one clearly is not. This out-of-place hut detracts from the Wilderness, and is probably an attractive nuisance at this point that creates its own safety hazards. The agency should remove what it can in a wilderness-compatible way and let the rest meld into the landscape. Whether or not the structure falls under the NHPA that would not be a hinderance to such an approach.

Please keep us updated on this proposal.

Sincerely,

A handwritten signature in dark ink, appearing to read "Gary Macfarlane". The signature is fluid and cursive, with the first name "Gary" and last name "Macfarlane" clearly distinguishable.

Gary Macfarlane

-for-

Wilderness Watch

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Notice Content

USDA Forest Service Uinta-Wasatch-Cache National Forest Utah County Legal Notice of Opportunity to Comment on Proposed Action Emerald Lake Shelter Reconstruction Project The Forest Service is requesting input on a proposal to reconstruct the Emerald Lake Shelter in Mount Timpanogos Wilderness, Utah County, Utah. The Shelter is a historic structure eligible to the National Register of Historic Places (NRHP) and contributes to the character of Mount Timpanogos Wilderness as an Other Feature of Value due to its cultural, scenic, and historical significance. The Proposed Action would reconstruct the Emerald Lake Shelter to similar specifications as existing. The project documents for review and a link to provide online comments are available at the project website under: <https://www.fs.usda.gov/project/?project=66370>. This 30-day scoping period provides an opportunity for the public to provide meaningful participation on the Proposed Action prior to a decision being made by the Responsible Official. This action is subject to the predecisional administrative review process outlined in Title 36 of the Code of Federal Regulations (CFR), Part 218, Subparts A and B. A final decision will not be made until after the requirements of 36 CFR 218.12, Timing of Project Decision, have been met. How to Comment This project, which implements the 2003 Land and Resource Management Plan, Uinta Planning Area is subject to the objection regulations found at 36 Code of Federal Regulations 218, subparts A and B. The 30-day scoping period represents an opportunity for the public to provide specific written comments on the project and therefore have standing to object. Please include the following information with your comments: (1) name, address, and contact telephone number or email; (2) the name of the project on which you are commenting; and (3) specific written comments related to the project. In cases where no identifiable name is attached to a comment, a verification of identity will be required for objection eligibility. If using an electronic message, a scanned signature is one way to provide verification. Electronic comments are preferred and may be submitted through the online commenting tool at: <https://www.fs.usda.gov/project/?project=66370> and clicking "Comment/Object on Project". Written, facsimile, hand-delivered, and electronic comments concerning this action will be accepted for 30 calendar days following the publication of this notice in the Provo Daily Herald. The publication date in the newspaper of record is the exclusive means for calculating the comment period. Persons who wish to comment should not rely upon dates or timeframe information provided by any other source. Regulations prohibit extending the length of the comment period. Persons providing comments are responsible for submitting them by the close of the comment period. Please submit your written comments to: Russell L. Hanson Jr., District Ranger at 390N 100E, Pleasant Grove, UT 84062. Business hours for submitting hand-delivered comments are 8 a.m. to 4:30 p.m. Monday through Friday, excluding holidays. The office business hours for submitting hand-delivered comments are 8 am to 4:30 pm, Monday through Friday, excluding holidays. For further information about the project, including documents and maps, or about the objection process, contact District Ranger, Russell Hanson at comments-intermtn-uinta-pleasantgrove@usda.gov. Legal Notice 13135 Published in the Daily Herald on August 14, 2024

Note: This could not be sent via the internet because the link is non-functional.